No. 98-671

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In The

Supreme Court of the United States

October Term, 1998

CITIZENS FOR A CONSTITUTIONAL CONVENTION, LET THE PEOPLE DECIDE, and MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, and JERRY BECK, on behalf of themselves and others similarly situated,

Petitioners,

v.

DWAYNE D. YOSHINA, Chief Election Officer of the State of Hawaii, MAZIE K. HIRONO, Lieutenant Governor of Hawaii, BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities; OFFICE OF ELECTIONS, STATE OF HAWAII; HAWAII STATE AFL-CIO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

STEVEN SCOTT MICHAELS*
**Counsel of Record*
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022
(212) 909-7265

MARK J. BENNETT
McCORRISTON MIHO MILLER MUKAI
Five Waterfront Plaza
Honolulu, HI 96813
(808) 529-7300

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

Respondents[1] labor to divine (and wrongly belittle) what is "of importance to petitioners" (Resp. Br. at 1). The main issue is what is important to this Court. Where a GVR order is concerned, *Lawrence v. Chater*, 516 U.S. 613 (1996), lays out those factors, and compels a GVR here. Respondents fail to show why this limited relief, or, for that matter, plenary review, is unwarranted in this case.

A. The Issues Presented by the Petition are Ripe; Indeed, Respondents' Arguments Here Contradict Their Position on Ripeness in the Ninth Circuit.

Respondents' claim that the Petition is "premature" (Resp. Br. at 10-11) is (a) wrong and (b) undermined by their arguments below opposing Petitioners' post-mandate motions. Indeed, the lead argument Respondents made below on this front was that the Ninth Circuit was procedurally barred from acting. Arguing to the Ninth Circuit that "[t]he judgment and mandate of this court have issued" and "[c]ertiorari lies to the Supreme Court,"[2] Respondents argued that the panel should deny relief as a motion to recall the mandate is a "rare and extraordinary step" that should be granted "only for the

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[1] Putative intervenors have waived their opposition as well as the right to cross-petition. Petitioners do not seek fees or costs from putative intervenors. Pet. App. 208a.

[2] As this Court is aware, a writ of certiorari does not "lie to the Supreme Court," but rather is issued to a lower court. The Attorney General's misdescription does not diminish the impact of her contradictory positions.

most compelling reasons." *See* Pet. App. 249a-50a. Put simply, Respondents, having argued to the Ninth Circuit that it should deny relief because the remedy lies *here*, now argue that this Court should deny relief because the remedy lies *there*. This two-facedness shows why a GVR is proper, if only to prevent a miscarriage of justice and a denial of Due Process.

Respondents' effort to blame Petitioners for filing a post-mandate motion below (Resp. Br. at 10) does not counsel against a GVR. Petitioners promptly and properly sought post-mandate relief hoping the Ninth Circuit, before the time for review here expired, would eliminate, or limit, the need for a writ.[3] The attack on that motion is groundless. Although the motion to recall was well founded, *see* Pet. App. 204a, the main reason it seems "the Ninth Circuit is waiting for this Court to act" (Resp. Br. at 19 n.10) is that court's likely desire to avoid ruling on when a recall is proper, an issue Respondents have pressed vigorously.[4] To deny a writ on grounds of prematurity, when Respondents are pressing procedural bars below, would countenance the kind of "manipulative litigation strategy" *Lawrence* condemns. 516 U.S. at 168. Petitioners do not seek review "before judgment is entered" below. S. Ct. R. 11. The judgment is "entered," and enforceable. This case is ripe.

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[3] Justice O'Connor's order granting an extension of time in which to seek a writ (Pet. App. 129a), although issued upon consent, was sought based on these considerations.

[4] This Court, by granting the writ, would spare (1) the Ninth Circuit from the need to address this issue; and (2) itself from the need to address the burdensome mandamus remedies Respondents suggest (Resp. Br. at 19).

B. Because the Ninth Circuit Had No Notice of Act 131's Passage, Nor Even an Assurance that it Would Become Law, When It Acted on June 23, 1998, There Is A Sufficient Chance of a New Result on Remand.

Respondents oppose a GVR because the panel "was fully apprised of, and presumably considered, the *potential* enactment of Act 131 long before it denied rehearing." Resp. Br. at 11 (emphasis added). The answer is that there are lots of "potential" laws that could moot or alter cases; but a "potential" law does not count. When the panel acted it had no assurance H.B. 3130 would in fact become law or notice of Act 131's enactment.

On June 21, 1998, 88 days had passed from the initial panel decision. The Governor had not acted. He did not need to do so until July 8. An April 29 news report stated his view as lukewarm at best: "[t]he governor has said he is opposed to a Con Con but has also said he would not veto the bill." Pet. App. 241a. Nothing had been heard from him since. His appointee, the Attorney General, did not notify the panel or Petitioners of any bill signing, and does not deny that it would have been impossible to stop the panel from acting in the hours between enactment and entry of the order on rehearing. No one contends the panel knew of Act 131, or the parties' views of its effects, on June 23, 1998.

The June 23, 1998, order, properly viewed, reflects no more than concern for expedition in an election case where the clock was ticking on the practical deadline for judicial resolution of equitable orders for the November election. *See Williams v. Rhodes*, 393 U.S. 23, 35 (1968). The

Ninth Circuit had expedited this case (Pet. App. 102a), and may well have thought that it was appropriate to deny rehearing without waiting further for the Governor, so as to permit election-related stay proceedings here to be concluded in an orderly way. This is at least a case where new events occurred "so shortly before the lower court's decision that the lower court had no 'opportunity' to [consider] them." 516 U.S. at 169. The lower court(s) should have a full chance to consider the impact of Act 131. A GVR is proper.

C. A GVR Would Properly Allow the Panel to Revisit Its Liability Ruling In Light of Act 131; At a Minimum the Merits Issues Warrant Review Here.

This case is about more than just fee issues – important as they are. The panel ruling conflicts with landmark election cases, from *United States v. Classic*, 313 U.S. 299 (1941), to *Burdick v. Takushi*, 504 U.S. 428 (1992). Ignoring those conflicts, Respondents conclusorily claim that the broad panel ruling "applied the distinction between 'fundamental unfairness' and 'garden variety election irregularities.' " Resp. Br. at 15.

This superficial argument is perhaps the strongest reason to grant review. Liability here turns on what "fundamental fairness" *means*. As Petitioners have shown, the panel ruling permitting retroactive application of an unexpected supermajority vote-counting rule defies *Classic*'s holding that Americans are entitled "to have their votes counted *as cast*," not "as retroactively interpreted." It conflicts with *Burdick*'s holding that voters must have

the chance "to act in a timely fashion" under election laws. Respondents have no, let alone a good, answer to this.

Respondents cannot mask the conflict the panel engenders with *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), and *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). They paint *Roe* as involving "inclusion of improper absentee ballots [that] diluted proper absentee and in person ballots" (Resp. Br. at 16). But *Roe*, which agreed that inclusion of the at-issue ballots was not "improper" under state law, held that the state courts' application of the "substantial compliance" doctrine was unanticipated, and, thus, federally void. *See* 43 F.3d at 577, 578 n.6, 581. Likewise, though Respondents describe *Griffin* as involving a refusal to count "proper absentee and shut-in ballots [that] disenfranchised almost ten percent of the voters" (Resp. Br. at 16), at issue there was an authoritative, but unanticipated (and thus federally void) retroactive ruling by the Rhode Island Supreme Court that took "absence of express reference to party primaries in the statute authorizing absentee and shut-in voting as a clear indication that such ballots were not legally authorized in primaries." 570 F.2d at 1068 n.4.

What the Ninth Circuit here strained to, but could not, hide, is that *Hawaii AFL-CIO v. Yoshina*, 935 P.2d 89 (Haw. 1997), is virtually identical to, if not worse than, the retroactive state court rulings in *Roe* and *Griffin*: In Hawaii, blank ballots "were simply ignored" and " 'Yes' votes were counted against 'no' votes and the majority ruled." Pet App. 7a. *Yoshina* radically changed that practice.

Respondents have no real response to this, other than to recite the panel's disparaging characterization of those returning blank ballots as "don't care" voters, and their attempt to label this view, which conflicts with the view of the "right to vote" in *Roe*, *Griffin*, and elsewhere, as "common sense." Resp. Br. at 16. Left to stand, the panel ruling leaves voters in the Ninth Circuit dramatically, and uniquely, unprotected against unexpected retroactive state court rulings on issues central to the right to vote.

Now that the Act 131 vote has occurred, any justification for refusing to disturb the panel's liability ruling has been eliminated. Both sides, as Petitioners show (Pet. at 23; Supp. Br. at 3), and Respondents confirm (Resp. Br. at 13 n.6, 17), have new arguments based on Act 131 that, if accepted, would very likely affect the panel judgment.[5] The panel should consider them. A GVR order should issue.[6] Alternatively, the Court should grant plenary

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[5] Respondents' Eleventh Amendment argument (Resp. Br. at 18), however, has already been persuasively rejected.

[6] The idea that Petitioners cannot seek vacatur of the judgment on their claim for a new vote because they urged passage of Act 131 (Resp. Br. at 13-14) rests on an implausible reading of *U.S. Bancorp v. Bonner Mall*, 513 U.S. 18 (1994). Before *Bancorp*, the Court routinely directed vacatur when the President signed legislation eliminating a controversy involving a Department under his supervision. *See, e.g., Department of the Treasury v. Galioto*, 477 U.S. 556, 560 (1986). Nothing in *Bonner Mall* changed this practice; a fortiori, it would be bizarre to deprive a citizen who advocates for, but is legally powerless to cause, legislation to be passed, of the ability to seek vacatur. At a minimum, the panel should deal with this issue after a GVR order enters.

review to consider the important liability and remedial issues here.[7]

D. A GVR Would Give the Panel the Opportunity to Consider Petitioners' Important § 1988 Claims; Alternatively, Plenary Review Should be Granted to Review the Threshold § 1988 Issues Involved.

Respondents do not dispute that this Court has long recognized that, under 42 U.S.C. § 1988, " 'parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief.' " *Maher v. Gagne*, 448 U.S. 133 (1980). Nor do they deny that "whether the lawsuit was causally linked to the relief actually obtained"[8] is "a factual determination for the district court,"[9] and, as we contend, "should be resolved on a remand." Pet. at 24 n.19.

Even so, Respondents ask this Court to deny a remand on the § 1988 claim here because "petitioners lost across the board in the Ninth Circuit" and "obtained

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[7] These include whether, as in *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995), the remedy should be an order that unstuffs the ballot box and recertifies the 1996 vote totals. Respondents' strained effort to distinguish *Roe* on the ground that the Hawaii Supreme Court has somehow ruled on the remedy for the unconstitutional retroactive application of *Yoshina* (Resp. Br. at 17 n.8) is baseless. The *Yoshina* court did not have either the constitutional question of liability, or the federal question of remedy, before it, because the Attorney General – the only *party* who could have raised them – forfeited those issues.

[8] *Sablan v. Dep't of Finance*, 856 F.2d 1317, 1325 (9th Cir. 1988).

[9] *McQuiston v. Marsh*, 707 F.2d 1082, 1085 (9th Cir. 1983).

nothing *in* their lawsuit" (Resp. Br. at 12) (emphasis modified). This bold argument is without support, and, if accepted, would work radical changes in the dynamics of litigation under dozens of federal statutes and allied fee-shifting laws. First, as legislative relief is not granted "in" a lawsuit, Respondents' position "negate[s] the possibility of ever granting attorneys' fees when Congress [or a state legislature] amends or clarifies legislation and thereby secures plaintiff's requested [relief]." *Paris v. HUD*, 988 F.2d 236, 241 (1st Cir. 1993). Second, under it, if officials survive the "first round" of appeal, they are free to sign mooting legislation, and avoid both further review and the payment of fees, irrespective of the strength of the underlying claim, or the reasons for legislative action. By granting a "free pass" for positions that survive initial review, Respondents' view would discourage early settlement, a central goal of § 1988. It would also enshrine in law the disturbing idea that litigation "ends" with an initial panel ruling, and a benefit conferred thereafter is automatically "gratuitous." Aside from ignoring FRAP 35 and 40, this view ignores the Constitution. Article III states there "shall be" "one supreme Court," and, for better or worse, that Court is not composed of three-judge panels that sit in San Francisco. The possibility of review in this Court should not artificially be eliminated from the calculus for deciding whether "catalyst" fees are available. Unless the "catalyst" theory of fee recovery is dead, an issue this Court has not resolved, and may wish to review here, Petitioners are entitled as a matter of Due Process to prosecute their fee claim on the merits in the District Court.

CONCLUSION

For the reasons above, in the petition, and in the supplemental brief, the petition should be granted, the judgment vacated, and the case remanded to the Court of Appeals for further consideration of Petitioners' claims for equitable relief, attorneys fees, and other costs, in light of Act 131, its history, and the vote had on November 3, 1998, or with such other instructions as the Court finds appropriate. In the alternative, the Court should grant plenary review as to the second question presented.

Respectfully submitted,

STEVEN SCOTT MICHAELS*
*Counsel of Record
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022
(212) 909-7265

MARK J. BENNETT
McCORRISTON MIHO MILLER MUKAI
Five Waterfront Plaza
Honolulu, HI 96813
(808) 529-7300

Counsel for Petitioners

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